Azizah bte Abdullah v Arab-Malaysian Eagles Sdn Bhd

HIGH COURT (KOTA BHARU) — CIVIL APPEAL NO 12-10-1995
NIK HASHIM JC
17 JUNE 1996

Evidence *— Burden of proof — Insurance contract — Allegation of non-disclosure of material fact —Whether burden on insurer to prove such allegation*

Evidence *— Standard of proof — Allegation of fraud in a civil case — Whether beyond reasonable doubt*

Insurance *— Duty of disclosure — Material facts — Whether there was non-disclosure of material facts by assured at the time of signing of proposal form — Whether duty to disclose extends to fact not known or could not reasonably be expected to be known — Whether insurer entitled to avoid liability — Conditions to be fulfilled before policy can be avoided — Insurance Act 1963 s 15C(4)*

The assured ('the deceased') bought ten units in a group policy life insurance scheme, five units on 1 May 1981 and the other five on 10 July 1987, for which he named his wife, the plaintiff/appellant ('the plaintiff') in this action as the sole beneficiary. It was expressly provided for in the policy that coverage would not extend to death from any prolonged illness. The deceased had signed a declaration in the proposal form denying that he was, at the material time, suffering from any such illness. Due to high fever, the deceased died on 13 December 1990. The insurers ('the defendants') paid the plaintiff only on five of the units bought on 1 May 1981 and denied liability on the remainder on the ground that there was non-disclosure of the fact that the deceased was suffering from diabetes. It was argued that diabetes was a prolonged illness, but the deceased had declared that he was not suffering from any prolonged illness. The deceased was alleged to have been diagnosed twice as suffering from diabetes, once on 28 February 1986 and again on 16 January 1987. The deceased was, however, tested negative for diabetes on 10 December 1990, ie three days prior to his death. The plaintiff sued the defendants for their refusal to pay on the balance of the units. The sessions court judge dismissed the plaintiff's claim on the ground that there was a doubt as to whether the deceased was truly not suffering from a prolonged illness, having been diagnosed twice before as suffering from diabetes. The plaintiff appealed. The issues were: (i) whether the policy could be avoided on the ground of misrepresentation based on the argument that there was non-disclosure of a material fact; (ii) what were the conditions to be fulfilled before such policy could be avoided on the ground of misrepresentation; (iii) whether the defendants bore the burden of proving their allegation of non-disclosure of a material fact; and (iv) what was the standard of proof on the defendants in establishing fraud on the part of the deceased in concealing a material fact.

Held, allowing the appeal:

(1) Materiality of a fact depended on the surrounding circumstances and the nature of the information sought by the defendants as insurers (see p 574G). Based on s 15C(4) of the Insurance Act 1963 ('the Act') there was a duty placed on the deceased to disclose material facts but such duty could not be extended to disclose facts which the deceased did not know or could not reasonably be expected to have known at the time when he signed the declaration in the proposal form (see p 576E–F); *Toh Kim Lian & Anor v The Asia Insurance Co Ltd* [1995] 3 AMR 2304 followed.

(2) A policy falling within the scope of s 15C(4) of the Act could only be challenged by the insurers when the following conditions existed: (i) the statement made by an assured related to a material matter or must suppress facts whch were material; (ii) the suppression or misstatement was fraudulent; and (iii) the assured must have known at the time, that the statement was false or that he had suppressed facts which were material to disclose (see p 574D–F); *New India Insurance Co v Raghava Reddi* AIR 1961 AP 295 followed.

(3) The defendant as insurers bore the burden of proving the allegation of non-disclosure of a material fact, and that the non-disclosure was fraudulent (see p 574A); *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] MLJ 5 followed.

(4) The standard of proving fraud in this country is proof beyond reasonable doubt (see p 575C); *Saminathan v Pappa* [1981] 1 MLJ 12 followed. However, it is not the law that every step in the allegation of fraud has to be proved by calling live and admissible evidence nor is it the law that fraud cannot be inferred in the appropriate case (see p 575D); *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1994] 3 AMR 2663 followed.

(5) From the evidence, it could be inferred that the deceased did not even know that he was suffering from diabetes. Thus the defendants had not discharged their burden and failed to prove non-disclosure, fraud and knowledge on the part of the deceased to avoid their liability to pay under the policy (see p 576G–H).

[Bahasa Malaysia summary

Pengambil insurans ('si mati') telah membeli sepuluh unit dalam skim insurans nyawa polisi kumpulan, lima unit pada 1 May 1981 dan yang lima lagi pada 10 Julai 1987, yang mana dia telah menamakan isterinya, iaitu plaintif/perayu ('plaintif') dalam tindakan ini sebagai benefisiari tunggal. Telah dinyatakan dengan jelasnya dalam polisi tersebut bahawa perlindungan tidak akan meliputi kematian yang disebabkan oleh penyakit yang berlarutan. Si mati telah menandatangani suatu deklarasi dalam borang cadangannya yang menyangkal bahawa pada masa yang penting, dia sedang menghidapi penyakit sedemikian. Pada 13 Disember 1990, si mati telah meninggal

dunia disebabkan demam panas. Syarikat insurans ('defendan') telah membayar plaintif hanya atas lima unit yang dibeli pada 1 Mei 1981 dan telah menyangkal tanggungannya atas bakinya atas dasar ketakdedahan fakta bahawa si mati telah menghidap penyakit kencing manis. Telah dihujahkan bahawa penyakit kencing manis merupakan penyakit yang berlarutan, tetapi si mati telah membuat deklarasi bahawa dia tidak menghidapi sebarang penyakit yang berlarutan. Dikatakan bahawa si mati telah dirawat dua kali sebelum ini untuk penyakit kencing manis, kali pertamanya pada 28 Februari 1986 dan sekali lagi pada 16 Januari 1987. Walau bagaimanapun pada 10 Disember 1990, tiga hari sebelum kematiannya, ujian yang dilakukan ke atas si mati untuk penyakit kencing manis adalah negatif. Plaintif telah mendakwa defendan kerana kegagalan mereka untuk membayar baki atas unit tersebut. Hakim mahkamah sesyen telah menolak tuntutan plaintif atas dasar bahawa ada keraguan sama ada si mati sebenarnya tidak menghidapi penyakit berlarutan, padahal dia telah dirawat dua kali sebelum itu untuk penyakit kencing manis. Plaintif telah merayu. Isunya adalah: (i) sama ada polisi tersebut boleh dielakkan atas alasan salah nyata berdasarkan hujah bahawa adanya ketakdedahan fakta penting; (ii) apakah syarat-syarat yang perlu dipenuhi sebelum sesuatu polisi itu boleh dielakkan atas dasar salah nyata; (iii) sama ada defendan menanggung beban membuktikan dakwaan mereka bahawa terdapat ketakdedahan fakta penting; dan (iv) apakah darjah pembuktian atas defendan untuk membuktikan fraud pada pihak si mati dalam menyembunyikan fakta penting.

Diputuskan, membenarkan rayuan itu:

(1) Kepentingan suatu fakta itu adalah bergantung kepada keadaan sekeliling dan jenis maklumat yang dikehendaki oleh defendan sabagai syarikat insurans (lihat ms 574G). Berdasarkan s 15C(4) Akta Insurans 1963 ('Akta tersebut') terdapat tugas yang diletakkan pada si mati untuk mendedahkan fakta penting tetapi tugas tersebut tidak boleh dilanjutkan untuk mendedahkan fakta-fakta yang tidak diketahui oleh si mati ataupun yang tidak dapat diketahui secara munasabah, ketika ianya menandatangani deklarasi dalam borang cadangan (lihat ms 576E–F); *Toh Kim Lian & Anor v The Asia Insurance Co Ltd* [1995] 3 AMR 2304 diikut.

(2) Sesuatu polisi yang termasuk di dalam lingkungan s 15C(4) Akta tersebut hanya boleh dicabar oleh syarikat insurans apabila syarat-syarat berikut wujud: (i) pernyataan yang dibuat oleh seorang pengambil insurans adalah berkenaan dengan satu perkara penting atau menyembunyikan fakta yang penting; (ii) penyembunyian fakta atau salah nyata itu dilakukan secara fraud; dan (iii) pengambil insurans telah mengetahui pada masa itu, bahawa pernyataan itu adalah palsu atau bahawa dia telah menyembunyikan fakta yang penting yang harus didedahkan (lihat ms 574D–F); *New India Insurance Co v Raghava Reddi* AIR 1961 AP 295 diikut.

(3) Defendan sabagai syarikat insurans menanggung beban pembuktian untuk membuktikan dakwaan ketakdedahan fakta yang penting, dan bahawa ketakdedahan tersebut adalah dilakukan secara fraud (lihat ms 574A); *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] MLJ 5 diikut.

(4) Darjah pembuktian fraud di negara ini adalah melampaui keraguan yang munasabah (lihat ms 575C); *Saminathan v Pappa* [1981] 1 MLJ 12 diikut. Walau bagaimanapun, ianya bukanlah undang-undang bahawa setiap langkah dalam dakwaan fraud harus dibuktikan dengan mengemukakan keterangan lisan dan yang boleh diterimamasuk; dan ianya bukanlah undang-undang bahawa fraud tidak boleh dibuktikan secara kesimpulan dalam kes-kes yang sesuai (lihat ms 575D); *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1994] 3 AMR 2663 diikut.

(5) Dari keterangan kes, bolehlah diambil kesimpulan bahawa si mati tidak mengetahui bahawa beliau menghidapi penyakit kencing manis. Oleh itu defendan tidak berjaya melepaskan beban mereka dan gagal membuktikan ketakdedahan pada pihak si mati untuk mengelakkan tanggungan mereka untuk membayar di bawah polisi itu (lihat ms 576G–H).]

Notes

For cases on the burden and quantum of proof in establishing fraud in civil cases, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 286–298.

For cases on non-disclosure of materials facts in insurance contracts, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue), paras 46–49.

Cases referred to

Brownlie Campbell (1880) 5 App Cas 925
Carter v Boehm (1766) 3 Burr 1905
Dirkje Peiternella Halma v Mohd Noor bin Baharom [1990] 3 MLJ 103
Goh Chooi Leong v Public Life Assurance Co Ltd [1964] MLJ 5
Joel v Law Union & Crown Insurance Co [1908] 2 KB 863
New India Insurance Co v Raghava Reddi AIR 1961 AP 295
Ng Pak Cheong v Global Insurance Co Sdn Bhd [1994] 3 AMR 2663
Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu [1992] 1 MLJ 249
Toh Kim Lian & Anor v The Asia Insurance Co Ltd [1995] 3 AMR 2304

Legislation referred to

Insurance Act 1963 s 15C(4)
Life Insurance Act 1938 [India] s 45

RG Naidu (*Indran Rajalingam* and *Zaharah Ismail* with him) (*Sandu & Co*) for the appellant.

Mohd Roslan bin Hassan (*Rithauddeen & Aziz*) for the respondents.

Cur Adv Vult

Nik Hashim JC: The deceased, 44, a major in the armed forces, died on 13 December 1990 due to high fever. Prior to his death he bought a total of ten units in the group insurance scheme policy of the respondents/defendants, Arab-Malaysian Eagles Sdn Bhd, through the Koperasi Tentera. He named his wife, the appellant/plaintiff as the sole beneficiary. The insurer paid her only for the five units which the deceased bought on 1 May 1981, while the insurer denied liability for the balance five units which were bought on 10 July 1987. It is in respect of this that the appeal lies.

The defendants refused to pay her on the ground of non-disclosure of a material fact by the deceased in the proposal form (exh D6), dated 10 July 1987. The plaintiff sued the defendants for the sum of RM89,500 being the assured amount for the additional five units, and interest thereon.

The defendants alleged that the deceased had breached the condition under cl 8(d)(i) of the Second Schedule to the group policy No GP 1025 (exh D7) in that he had made a declaration in cl 5 claiming that:

> Saya mengaku Darjah Kecergasan Tubuh (DKT) saya adalah FE pada masa saya menandatangani borang permohonan ini. Saya juga mengaku bahawa saya adalah di dalam keadaan kesihatan yang baik, tidak mempunyai *penyakit yang berlarutan atau berulang*, sakit jiwa/otak dan lain-lain kecacatan/kelemahan tertentu pada masa saya menandatangani borang permohonan ini. (Emphasis added.)

According to the medical report (exh D2) however, he was diagnosed as suffering from diabetes since February 1986.

Clause 8(d)(i) of exh D7 provides:

> (d) Exclusions:
>
> This group insurance scheme does not provide coverage on deaths or accidents arising from or under the following situations:
>
> (i) *Prolonged illnesses* which have been diagnosed prior to the date of joining the insurance scheme based on the contents in the medical report of the deceased. (Emphasis added.)

The learned sessions court judge in dismissing the plaintiff's claim ruled at p 11 of record as follows:

> Mahkamah pada penemuan faktanya memutuskan bahawa mahkamah meragui sama ada benar pada 10 Julai 1987 si mati tidak mempunyai penyakit yang berlarutan. Ini adalah kerana pada ujian bulan Februari 1986 dan bulan Januari 1987, dia didapati mengidap penyakit kencing manis, satu penyakit yang berlarutan.

Encik RG Naidu, leading counsel for the plaintiff submitted that more than two years had lapsed after the life policy was effected and hence s 15C(4) of the Insurance Act 1963 ('the Act') applies to the present case. Encik Mohd Roslan bin Hassan, learned counsel for the defendants shared his view on this point. Counsel for the plaintiff further argued that the non-disclosed fact must not only be material but should also have been fraudulently concealed, and stressed that the burden is on

the defendants to prove the non-disclosure. I agree with his submission. It is trite law that the burden of proof is on the insurer to prove non-disclosure and that they have the right to begin (see *Goh Chooi Leong v Public Life Assurance Co Ltd* [1964] MLJ 5). The policy has been in force for more than two years and therefore s 15C(4) of the Act rightly applies to this case.

Section 15C(4) provides:

> No life policy ... shall, after the expiry of two years from the date on which it was effected be called in question by an insurer on the ground that a statement made in the proposal for insurance or in a report of a doctor, referee or any person, or in a document leading to the issue of the policy, was inaccurate or false unless the insurer shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policyholder with the knowledge that the statement was false or that it suppressed a material fact.

There seems to be, as far as I am aware of, no decided cases in the country on the application of s 15C(4). In the absence of local authorities, it may perhaps be useful to examine the Indian laws on this point.

The learned author Dr Nik Ramlah Mahmood at p 71 of the book entitled *Insurance Law in Malaysia* (1992) said that the Indian Supreme Court in applying a similar provision in the form of s 45 of the Life Insurance Act 1938 of India, enumerated three conditions before a life policy which comes within the scope of such a provision can be challenged by the insurer. The conditions are as follows:

(1) That the statement must relate to a material matter or must suppress facts which are material to disclose;

(2) That the suppression or misstatement must have been fraudulently made by the policyholder; and

(3) That the policyholder must have known at that time, that the statement was false or that the facts suppressed were material to disclose.

In *New India Insurance Company v Raghava Reddi* AIR 1961 AP 295, it was held that a policy cannot be avoided on the ground of misrepresentation unless the three conditions are established. With regard to the materiality of a fact, it depends on the surrounding circumtances and the nature of the information sought by an insurer (see *Hand Book on Insurance Laws*, 3rd Ed 1989, at p 83).

Below the printed declaration in cl 5 of exh D6, appears an important notice in a green box which states:

> Mustahak: Penerangan menurut s 16(4) Akta Insurans 1963, kamu adalah diminta menerangkan dengan penuh dan benar segala butir-butir yang kamu tahu atau harus tahu dicadangkan insurans ini, kalau tidak polisi yang dikeluarkan menurut cadangan ini adalah tidak sah.

The warning is self-explanatory in that the deceased was obliged to disclose fully and faithfully all the facts which he knew or ought to have known — otherwise the policy issued would be void. In my view, this warning is consistent with the nature of the contract of insurance which is one of uberrimae fidei, ie of utmost good faith. It is settled law that insurers are

entitled to full disclosure of all knowledge possessed by the assured that is material to the risks (*Joel v Law Union and Crown Insurance Company* [1908] 2 KB 863). However, the duty of disclosure is not confined to the assured. The insurers are also bound by this common law. It is a reciprocal duty (*Carter v Boehm* (1766) 3 Burr 1905, per Lord Mansfield at p 1909 and *Brownlie v Campbell* (1880) 5 App Cas 925, per Fletcher Moulton LJ at p 954). It is also a principle that a fair and reasonable construction be placed on any question in the proposal form (*Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu* [1992] 1 MLJ 249, SC).

It is the contention of the defendants that the deceased had failed to disclose a material fact that he was suffering from diabetes, which is a prolonged illness, thereby rendering the policy voidable at the instance of the defendants.

The standard of proving fraud in this country is proof beyond reasonable doubt (*Saminathan v Pappa* [1981] 1 MLJ 12, FC), but it is not the law of evidence that every step in the allegation of fraud has to be proved by calling live and admissible evidence, nor is it the law that fraud cannot be inferred in the appropriate case: *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1994] 3 AMR 2663.

Having considered the law and its principles in the cases aforesaid, the court has to decide whether the defendants have proved fraud on the part of the deceased. Before answering that question, the court has to look at the evidence as to whether the deceased knew that he had diabetes on 10 July 1987, and if he had it and knew about it, then whether he really understood that diabetes is a prolonged illness. Indeed there is nothing in exh D6 defining the words *penyakit yang berlarutan atau berulang*, nor is there any explanation of what the term *prolonged illnesses* in cl 8(d)(i) of exh D7 means. As they stand, the words *penyakit yang berlarutan atau berulang* and *prolonged illnesses* are to my mind, ambiguous, lacking specifics and indeed confusing. They are not self-explanatory. In the absence of their meaning, it is rather unfair in my view, to impute knowledge and understanding on the part of the deceased even though he was an officer in the armed forces and ought to have known that diabetes may be classified under *prolonged illnesses*. In this case, there was no evidence to show that the term had ever been explained and understood by the deceased at the time when he signed exh D6. To my mind, it is equally a duty on the part of the defendants to make the information sought plain and clear. The information regarding *prolonged illnesses* is vague and doubtful. If the words are obscure or doubtful in their meaning, the court should so construe them in order to avoid injustice (per Gunn Chit Tuan SCJ in *Dirkje Peiternella Halma v Mohd Noor bin Baharom* [1990] 3 MLJ 103 at p 107).

Lt Kol (Dr) Abdul Aziz bin Yusof ('SP3') testified at p 9 of the record as follows:

> Tiada rekod yang dia kena diabetes tapi ada arahan untuk rujuk doktor pakar tapi tidak tahu apa jadi. Laporan eks P1 berdasar rekod-rekod sahaja.

Therefore, it is clear from the evidence adduced in the court below that even SP3 who had access to the record was unable to confirm that the deceased was in fact suffering from diabetes and that he was under

treatment. Though he prepared the medical reports (eks P1) and (eks D2) based on the previous records, the original records however, were not produced in court to support the claim that the deceased had diabetes on 28 February 1986 and 16 January 1987. SP3 further said that although diabetes is a prolonged illness, it is also a practice in the armed forces to refer a diabetic patient to the specialist and the medical board. In this case however the deceased was not referred.

Dr Pancho ('SP5'), a general practitioner, examined the deceased twice — once on 3 December 1990 and again on 10 December 1990, ie three days before he died. He testified at p 35 of the record as follows:

> Saya buat periksa air kencing pada 10 Disember 1990 dan dapati gula adalah negatif.

He went on to say at para C of same page:

> Pada pemeriksaan saya tiada bukti dia ada kencing manis ... .

He further stated at para F:

> Sebelum injection, tanya pesakit ada alahan atau apa-apa sakit, bila kata tiada, diberi suntikan.

Based on this evidence, it can be inferred that the deceased did not even know that he was suffering from diabetes. Though SP5 agreed that diabetes is a prolonged illness, his testimony has created some doubts whether the diabetes that the deceased was alleged to be suffering from could be classified as a prolonged illness. Surely if he was suffering from diabetes, it would have been detected when SP5 examined him on 10 December 1990. It follows therefore that the duty to disclose material facts cannot be extend to disclose facts which the deceased did not know or which he could not reasonably be expected to have known at the time when he signed the declaration in exh D6 (see *Toh Kim Lian & Anor v The Asia Insurance Co Ltd* [1995] 3 AMR 2304). Indeed the deceased died on 13 December 1990 not due to diabetes but due to high fever.

As I have mentioned earlier, s 15C(4) of the Act requires three conditions to be established before the life policy can be called in question. From the evidence, I conclude that the defendants had not discharged their burden and failed to prove non-disclosure, fraud and knowledge on the part of the deceased to avoid their liability to pay under the policy. In the circumtances, I allow the appeal, set aside the order of the learned judge and judgment is awarded to the plaintiff, with costs, as prayed in paras (a), (c) and (d) of her statement of claim.

Appeal allowed.

Reported by Chris Lin